Second. The cities claim that the FCC should not have treated franchise-related costs (including fees paid to franchising authorities) and programming costs as external because cable companies in fact have significant control over those costs. Although cable operators may indeed have some bargaining power vis-a-vis franchising authorities and programmers, there is no evidence in the record to support the cities' contention that operators have substantial control over franchise-related and programming costs, *i.e.*, that franchising authorities and programmers are price takers. Moreover, the Commission's decision to grant external treatment to such costs was in part meant to give effect to the specific provisions of the Act that require the Commission to take into account, in prescribing rate regulations for the basic service tier, both franchise fees and other costs associated with meeting franchise requirements. 47 U.S.C. §§ 543(b)(2)(C)(v), (vi); *First Reconsideration*, 9 F.C.C.R. at 1211, 1217–20. The Act is also intended to promote the expansion and diversification of cable programming, *see* §§ 2(a)(6), 2(b)(1), 2(b)(3), which is more likely to come about if cable operators may recoup their costs from subscribers willing to pay for more expensive and therefore presumably better programs. Although the statute may not require the Commission to grant external treatment to franchise-related and programming costs, the cited provisions surely give the Commission the authority to do so, particularly in the absence of evidence indicating that cable operators do in fact have substantial control over such costs.

Third. Although their claim is rather vague, the cities seem to suggest that the FCC improperly allowed cable operators to double count certain of their costs by according external cost treatment to some expenses that they could also take into account in establishing their initial rates. This suggestion, however, reflects a misinterpretation of the form that the Commission created for reporting external costs. Because the Commission resolved any ambiguity that the form may have created by expressly stating that only changes in costs will be recognized and accorded external treatment, *Second Reconsideration*, 9 F.C.C.R. at 4201–02, the cities' concern is unwarranted.

Fourth. The cities next challenge as one-sided the Commission's decision to allow cable companies to adjust rates for external cost increases quarterly while requiring them to adjust rates for external cost decreases only once a year. Although the Commission recognized that allowing quarterly increases would add to the administrative burdens it faces, it decided to provide this opportunity lest cable operators be unduly burdened by having to absorb cost increases for up to a year. *First Reconsideration*, 9 F.C.C.R. at 1233–35. That concern seems well-founded, particularly in light of (1) the constitutional concern that arises if a cable company is required to absorb costs to the point that its allowed rates become confiscatory, *see Southern Bell Tel. & Tel. Co.*, 781 F.2d at 214 & n.5, and (2) the administrative costs of the alternative, *i.e.*, cost-of-service regulation. Because subscribers have no parallel constitutional right that would be protected by requiring quarterly adjustments to reflect cost decreases, the Commission was within its statutory mandate in deciding that such a requirement would not be worth the resulting administrative burden upon the operators and the agency itself. *See* 47 U.S.C. § 543(b)(2)(A) (requiring the Commission to "reduce administrative burdens"). Moreover, the Commission limited the ability of a cable operator to exploit the disparity in the cost increase and decrease reporting periods by requiring that any operator that files for a cost increase must set off any cost decreases against cost increases in the same quarterly report. *Second Reconsideration*, 9 F.C.C.R. at 4202.

Fifth. In a similar vein, the cities argue that the FCC improperly failed to require cable companies to report increases in advertising revenues and to offset those increases against any external costs. Because advertising revenues, we are told, fluctuate greatly, it would be administratively burdensome to incorporate their ups and downs into the ratemaking process. Hence, the Commission's decision not to do so appears to be reasonable. We do not rule out the possibility, however, that this decision could become unreasonable over time if evidence comes before the Commission clearly demonstrating that advertising revenues have become a steady and significant source of increased revenue for cable operators, thereby calling in question the reasonableness of the rates they may charge under the price cap formula.

Sixth. The cities finally contend that the Commission arbitrarily refused to adopt a "productivity offset" (*i.e.*, a factor to account for cost-reducing productivity gains in the cable industry) against the inflationary increases allowed to cable operators. They point to the Commission's decision to include such an offset in its telephone price cap regime, *see generally, Policy and Rules Concerning Rates for Dominant Carriers: Report and Order and Second Further Notice of Proposed Rulemaking,* 4 F.C.C.R. 2873 (1989), and argue that by failing to do so here, the Commission improperly subordinated the interests of consumers to those of cable operators.

The Commission adequately explained the apparent disparity: the record in the telephone price cap proceeding included extensive evidence demonstrating that increases in productivity in the telephone industry significantly exceed those in the general economy. *Rate Order,* 8 F.C.C.R. at 5781–82. There is no comparable evidence concerning the cable industry in the present record. Therefore, we are constrained to affirm the Commission's decision not to impose a productivity offset at this time. As with its decision not to offset advertising revenues, however, the Commission's decision not to establish a general productivity offset could ultimately prove to be unreasonable if the Commission is ever confronted with evidence indicating that the cable industry does in fact benefit from productivity increases that significantly outstrip those in the general economy.

2. *The Cable Companies' Petitions*

The cable petitioners question only whether the external-cost rules for going-forward rates should have been applied to the "gap period" between passage of the Act and the date upon which each cable operator actually became subject to rate regulation under the Act. Although the most obvious way to set cable operators' initial rates might have been simply to reduce by 17 percent the rates that they were charging when the new regulations took effect, the Commission decided not do that lest it build into the permitted initial rates any unwarranted rate increases that cable operators took after passage of the 1992 Cable Act. *Second Reconsideration*, 9 F.C.C.R. at 4170. The Commission instead decided to discount the rates charged by operators on September 30, 1992 (the last month before passage of the Act) by 17 percent, and then to adjust that rate to allow for inflation during the gap period. *Id.* at 4170–71. At the same time, however, the Commission decided not to allow cable operators to adjust their rates to reflect external cost increases incurred during the gap period, which the cable petitioners say is arbitrary and capricious.

The FCC acknowledged that allowing adjustments for changes in external costs during the gap period would make the initial rates more accurate, but it decided that doing so would place undue administrative burdens upon both cable operators and the Commission. *First Reconsideration*, 9 F.C.C.R. at 1233. That explanation is patently unconvincing for two reasons. First, the Commission's concern with the administrative burden upon cable operators is unnecessary: if the cost of recovering its increased external costs exceeds the revenue to be gained, the cable operator can be counted upon to forego the pleasure. Second, the Commission's concern with the administrative burdens that it would face also rings hollow because the type of documentation to be reviewed would be the same as the external-cost documentation that the Commission must review for all post-gap periods pursuant to the going-forward rules.

The Commission also attempts to justify its decision by noting that the disadvantaged cable operator can always turn to the cost-of-service option. But that option, by the Commission's own admission, is costly for cable operators and the Commission alike, and is intended to be a limited "safety-valve" exception. *Second Reconsideration*, 9 F.C.C.R. at 4196.

In sum, the Commission offers no reason to doubt that cable operators incurred external costs during the gap period, yet under its regulations they would never be able to recoup those costs short of opting for cost-of-service regulation—which would be akin to shooting a fly with a blunderbuss. Because the Commission's proffered justifications are completely unacceptable, we hold that its decision to preclude a rate adjustment designed to recover changes in external costs incurred during the gap period is arbitrary and capricious.

C. *The Cable Companies' Other Challenges*

The cable petitioners make two other claims, both of which question the FCC's interpretation of certain provisions of the Act. Neither challenge can surmount the hurdle set for it by *Chevron.*

1. *Tier Neutrality*

As discussed in Part I, the Commission decided to apply its ratemaking rules in a "tier-neutral" fashion, meaning that the same methodologies and standards are used to establish allowable rates for both the basic service tier and the cable programming service tier(s). *First Reconsideration,* 9 F.C.C.R. at 1182–85; *Rate Order,* 8 F.C.C.R. at 5759–60, 5881–82. It did so in order to avoid creating any incentive for cable operators to move programming between the basic service and cable programming service tiers by making any such move revenue neutral. *See First Reconsideration,* 9 F.C.C.R. at 1183; *Rate Order,* 8 F.C.C.R. at 5759–5760. The FCC further explained that because it is simpler, the tier-neutral approach also serves to reduce the administrative burden upon all concerned. *Id.*

The cable petitioners contend that the language, structure, and legislative history of the 1992 Cable Act simply do not permit the Commission to apply the same regulatory standard to the basic service tier and to cable programming service. That contention, however, is premised upon a significant misunderstanding of the Act.

First, the cable petitioners misconstrue the Congress's findings. Focusing solely upon § 2(a)(1) of the Act, they suggest that the Congress found that only basic cable rates were excessive. Although that section begins with a reference to then-recent increases in the rates for basic cable service, it ends with the broader conclusion that "[t]he average monthly cable rate has increased almost 3 times as much as the Consumer Price Index since rate deregulation." While it is possible that the Congress meant, as the cable petitioners suggest, only that average monthly rates for basic cable service had increased by thrice the CPI, that is not what the provision says. Moreover, after reviewing the rest of the Congress's findings it becomes clear that, regardless of the proper construction of § 2(a)(1), the Congress was concerned with what it perceived to be the excessiveness of cable rates in general, not the rates for a particular type of service. Indeed, the Congress immediately followed the finding referenced by the cable operators with a general finding (in § 2(a)(2)) that cable operators serving most cable subscribers do not face effective competition and consequently exercise undue market power. That finding admits of no distinction between basic tier and cable programming service. Similarly, the Congress made findings about increasing concentration and vertical integration in the cable industry generally. *See* §§ 2(a)(4), (5).

The statute is even clearer when it broadly states that:

> It is the policy of the Congress in this Act to . . .
>
> (4) where cable television systems are not subject to effective competition, ensure that consumer interests are protected in receipt of cable service; and
>
> (5) ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers.

§§ 2(b)(4), (5). Although the cable petitioners would like to limit that policy to the basic service tier, the stubborn fact remains that the Congress directed it to the cable industry in general. Put simply, the legislature's generalized approach to formulating the problem and to enumerating the objectives of the statute simply do not support the cable petitioners' position that the Act is concerned only (or even concerned more) with rates for the basic service tier than with rates for cable programming service; if anything, the Congress's non-tier-specific findings and policy statement support the FCC's view that tier-neutral regulation is appropriate.

The cable petitioners also mistake the significance of certain substantive differences between the statutory sections that govern respectively the basic service tier and cable programming service. Although the Act requires the Commission to establish regulations to ensure "reasonable" rates for the basic service tier, 47 U.S.C. § 543(b)(1), with respect to cable programming service it authorizes the Commission to correct "unreasonable" rates. 47 U.S.C. § 543(c)(1)(A). The cable petitioners perceive a middle ground between the "reasonable" and the "unreasonable," suggesting that in light of those differing terms the Commission's regulation of cable programming service must be more lenient than its regulation of the basic service tier. That suggestion is at the least counterintuitive; if the Congress intended to invoke different levels of regulatory stringency, it seems most unlikely that they would have used those cognate terms to describe the two regimes.

Moreover, the Commission's explanation—that the terminological difference reflects a procedural rather than a substantive distinction in the two regulatory schemes—is a good deal more persuasive. *See Rate Order*, 8 F.C.C.R. at 5875. Although the Act requires local franchising authorities actively to regulate rates for the basic service tier in accordance with established FCC standards, it precludes the Commission from reviewing a system's rates for cable programming service unless and until it receives a complaint from a subscriber, the franchising authority, or some other relevant state or local governmental entity. *Compare* 47 U.S.C. § 543(b) *with* 47 U.S.C. § 543(c). Consequently, rates for the basic service tier will always be reviewed *ex ante* while rates for cable programming service will only be reviewed *ex post*. It therefore makes sense that the Congress would formulate the question respecting the basic service tier as whether, *ex ante*, a proposed rate would be reasonable, and yet formulate the question respecting cable programming service as whether, *ex post*, an existing rate is unreasonable. Because those key terms are strikingly similar and the slight difference between them is easily explained as a product of the different procedural postures in which they will arise, we conclude that this text actually supports the Commission's tier-neutral approach rather than the contentions of the cable companies.

The cable petitioners also point to other differences between the regulatory regimes for the basic service tier and for cable programming service. They note, for example, that the Act provides that "in establishing the criteria for determining in individual cases whether rates for cable programming services are unreasonable" the Commission shall "consider" six factors, 47 U.S.C. § 543(c)(2), several of which are different from the factors that the statute requires the Commission to take into account in prescribing regulations to govern rates for the basic service tier. They focus upon two of the six statutory factors—"rates for similarly situated cable systems offering comparable cable programming services," 47 U.S.C. § 543(c)(2)(A), and "the history of the rates for cable programming services," 47 U.S.C. § 543(c)(2)(C)—and argue that the Commission failed to account for those factors in opting for tier-neutral regulation.

This argument is unpersuasive for several reasons. First, the statute by its terms merely requires the Commission to consider the six factors in deciding how best to determine whether a rate is unreasonable. 47 U.S.C. § 543(c)(2). That means only that it must "reach an express and considered conclusion" about the bearing of a factor, but is not required "to give any specific weight" to it. *Central Vermont Ry., Inc. v. ICC*, 711 F.2d 331, 336 (D.C. Cir. 1983). Therefore, when the Commission, after expressly considering the potential role of the rate history factor, ultimately concluded that it should not be given any weight, *see Rate Order*, 8 F.C.C.R. at 5764–65, 5766, 5882 n.970, it did not violate the statute.

The cable petitioners are simply wrong in suggesting that the Commission never considered the role of "similarly situated cable systems." The Act provides:

> In establishing the criteria for determining in individual cases whether rates for cable programming services are unreasonable ... the Commission shall consider, among other factors ... (A) the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors....

47 U.S.C. § 543(c)(2). This the Commission did by gathering data for both non-competitive and competitive systems and performing multiple regression analyses in order to isolate and to control for factors that affect cable rates other than the degree of competitiveness in the market. That exercise was in effect a comparison of similarly situated cable systems undertaken in order to determine which characteristics (such as types of facilities, number of subscribers *etc.*) have an effect on rates. *See Second Reconsideration*, 9 F.C.C.R. at 4178 n.165, 4288–4301; *Rate Order*, 8 F.C.C.R. at 5768–69, 6143–47. We therefore reject the cable petitioners' claim that the Commission did not adequately consider similarly situated systems.

Finally, the cable petitioners seize upon the requirement in the provision regulating the basic service tier that the Commission's regulations "shall be designed to achieve the goal of protecting subscribers ... from rates for the basic service tier that exceed the rates that would be charged ... if such cable system were subject to effective competition." 47 U.S.C. § 543(b)(1). Although the provision regulating cable programming service includes, as one of the six factors that the Commission must consider in establishing the criteria for determining whether rates are unreasonable, the "rates for cable systems ... subject to effective competition," 47 U.S.C. § 543(c)(2)(B), it does not contain an express directive that rates not exceed the competitive level, as does the provision for the basic service tier. All that difference could establish, however, is that the Commission has greater discretion in determining whether a rate for cable programming service is unreasonable than it has in determining whether a rate for the basic service tier is reasonable; it does not mean, as the cable petitioners appear to suggest, that the Commission must permit rates for cable programming service that are higher than those that would occur were the system subject to effective competition. In adopting the tier-neutral approach, the Commission did not ignore the relatively minor constraints that the Act places upon it in determining what constitutes an unreasonable rate for cable programming service; quite the contrary, the Commission met those requirements and exceeded them. We therefore reject the cable petitioners' claim that the Commission cannot apply the "effective competition" lodestar to rates for both the basic service tier and cable programming service.

To recapitulate: the statutory findings and policy statement, and the text of the provisions requiring that the Commission prescribe "reasonable" rates for basic service and proscribe "unreasonable" rates for cable programming service all support the Commission's tier-neutral approach. Although there are some differences in the factors that the Commission must consider in crafting its regulations for the two different tiers, the agency did consider those factors and account for them in adopting the tier-neutral approach. We therefore conclude that the tier-neutral approach is based upon a permissible interpretation of the Act.

Finally the cable petitioners contend that even if the tier-neutral approach is permitted by the Act, the Commission erred by failing to give each cable operator the option instead to come under an overall rate limit by lowering its rates for the basic tier and raising its rates for cable programming service. They argue that such an "umbrella" option would harm nobody because it would still preclude cable operators from raising their rates, in the aggregate, above what would be allowed under the tier-neutral approach, and would benefit some subscribers because it would provide cable operators with the flexibility to lower their rates for the basic service tier that all subscribers are required to purchase under the Act.

Although the umbrella option might not result in higher rates, it would, as the Commission explained, significantly increase the administrative burden associated with regulating cable rates. *Rate Order*, 8 F.C.C.R. at 5759–60. Indeed, rather than having one set of rules that applies to all regulated tiers, the addition of the umbrella option would require the Commission to develop an alternative set of rules for those systems that opt to have their rates reviewed in the aggregate. Also, because local franchising authorities are primarily responsible for monitoring rates for the basic service tier while rates for cable programming service fall exclusively within the Commission's purview, 47 U.S.C. § 543(a)(2), the umbrella approach would add administrative burdens by requiring greater coordination between the two regulators. In light of the Act's requirement that the Commission seek to reduce administrative burdens, 47 U.S.C. § 543(b)(2)(A), we hold that the Commission's decision to reject the umbrella option was not unreasonable.

2. *Regulatory Treatment of Equipment Used By Subscribers*

The 1992 Cable Act provides that:

> The regulations prescribed by the Commission under [the basic service tier] subsection shall include standards to establish, on the basis of actual cost, the price or rate for—
>
> (A) installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit and, if requested by the subscriber, such addressable converter box or other equipment as is required to access [video programming offered on a per channel or per program basis.]

47 U.S.C. § 543(b)(3). Because this provision limits to actual costs the rate that a cable operator may charge for equipment, its scope is of considerable economic importance. The Commission has interpreted it to cover all equipment that a subscriber uses to receive the basic service tier in a system not subject to effective competition; that includes equipment that is also used to receive other cable services. *Rate Order*,

8 F.C.C.R. at 5800. Not surprisingly, the cable companies offer a more narrow interpretation; they argue that the provision does not extend to any equipment that is used in part to receive cable programming service. Equipment used in part to receive cable programming service would, under the cable companies' view, be regulated in accordance with the general rate regime for cable programming service, meaning only that the rates for such equipment may not be "unreasonable." Although the statute is far from clear, the Commission's interpretation is a permissible one, and therefore must prevail.

The cable petitioners' interpretation is suspect for two reasons. First, it does violence to the natural meaning of the term "used": that term is not normally understood to mean "used exclusively," which is effectively the interpretation they propose. Second, and more important, because the actual cost provision expressly includes equipment required to access unregulated video programming offered on a per channel or per program basis, the cable petitioners' interpretation would produce the rather anomalous result that equipment used to receive unregulated channels would be regulated at actual cost while equipment used in part to receive regulated cable programming service channels would be regulated more leniently, *viz.*, only to prohibit rates that are "unreasonable." The cable petitioners have not been able to offer a convincing explanation for why the Congress would have intentionally created such an odd arrangement.

The cable petitioners are not, however, without some support in the statute for their position. They note that "cable programming service" is defined as:

> any video programming over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.

47 U.S.C. § 543(*l*)(2). They make much of the phrase "equipment used for the receipt of such video programming,"

arguing that it means that any equipment used to receive cable programming service falls within the "unreasonable rate" standard of regulation applicable to cable programming service, *see* 47 U.S.C. § 543(c), rather than the "actual cost" standard of § 543(b)(3). Although focusing upon that phrase might at first seem to help the petitioners' cause, it begs the ultimate question; both § 543(b)(3) and § 543(*l*)(2) refer to the equipment "used" to receive programming, so the question is which one effectively means "used exclusively?" The cable petitioners and the Commission each have their candidate, of course—the Commission wins if § 543(*l*)(2) receives the additional modifier, the cable companies if that limitation applies to § 543(b)(3)—and neither suggestion is unreasonable.

Although each side cites snippets of legislative history, neither can point to anything remotely close to dispositive. We are therefore left with a virtual dead heat, save for the observation that the cable petitioners' interpretation would produce the more anomalous result. Obviously, the Congress did not address the specific issue before us. Therefore, the FCC having offered a permissible interpretation of the statute, we are bound to accept it. *Chevron,* 476 U.S. at 842–43.

III. Conclusion

For the foregoing reasons, we conclude upon the present record that, with one exception, the Commission's cable rate regulations are neither arbitrary and capricious nor contrary to the charter given the agency in the 1992 Cable Act. Therefore, we grant the cable companies' petitions and vacate the rule insofar as the FCC denied them recovery of their gap-period external cost increases; we deny the cable companies' petitions and those of Blade Communications and of the cities in all other respects concerning rate issues.

So ordered.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge:* These are consolidated petitions for review of three Federal Communications Commission orders,[1] implementing section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 106 Stat. 1460, 1464–71 (codified at 47 U.S.C. § 543 (Supp. IV 1992)).[2] The question to be decided in this opinion is whether the Commission's rate regulations issued under section 3 of the 1992 Cable Act, 47 U.S.C. § 543, violate the First Amendment rights of the cable operators who are before us as petitioners.[3]

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[1] The orders are: (1) *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 F.C.C.R. 5631 (1993) ("Rate Order"); (2) *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking, 9 F.C.C.R. 1164 (1993) ("First Reconsideration"); and (3) *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking, 9 F.C.C.R. 4119 (1994) ("Second Reconsideration").

[2] We have today also issued separate opinions deciding petitioners' challenges to the Commission's rate formulas (opinion of Ginsburg, J.) and the Commission's rules (opinion of Rogers, J.).

[3] "Cable petitioners" are Armstrong Holdings, Inc.; Atlanta Cable Partners, L.P.; Benchmark Communications, L.P.; Blade Communications, Inc.; Cable Telecommunications Association; Cablevision Industries Corporation; Century Communications Corporation; Clinton Cable, L.P.; Coalition of Small System Operators; Columbia Associates, L.P.; Comcast Cable Communications, Inc.; Continental Cablevision, Inc.; Cox Cable Communications, Inc.; C–TEC Cable Systems, Inc.; Daniels Cablevision, Inc.; Douglas Communications Corp. II; Falcon Holding Group, L.P.; Georgia Cable Partners; Greater Media, Inc.; Harron Communications Corp.; Horizon Cable I, L.P.; McDonald Investment Company, Inc.; National Cable Television Association, Inc.; Newhouse Broadcasting

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Almost from its inception in the 1950s, the cable industry has been subject to some form of rate regulation. Initially, rate regulation generally was administered by municipalities and other local franchising authorities "as a means to prevent cable operators from charging unreasonably high rates." H.R. REP. No. 934, 98th Cong., 2d Sess. 24 (1984). In 1984, Congress enacted the Cable Communications Policy Act, Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Cable Act"), to "establish a national policy concerning cable communications." 47 U.S.C. § 521(1). With respect to rate regulation, Congress then determined that local governments should be permitted to regulate only the basic service rates of those cable systems that are not subject to "effective competition" as defined by the Commission. *See* S. REP. NO. 92, 102d Cong., 1st Sess. 4 (1991) ("Senate Report"); H.R. REP. NO. 628, 102d Cong., 2d Sess. 30 (1992) ("House Report"). The Commission's definition of "effective competition," as implemented in 1986, effectively prohibited local authorities from regulating the rates of cable systems in approximately 96 percent of the nation's communities. House Report at 31; *see also* Senate Report at 4.

Experience under the 1984 Cable Act's deregulatory regime led Congress to enact the 1992 Cable Act. Contrary to Congress's expectation in 1984, competition to cable did not develop from satellite systems (House Report at 26), and a commentator noted that "consumers cannot be worse off than under an unregulated monopoly." Thomas W. Hazlett, *Duopolistic Competition in Cable Television: Implications for Public Policy,* 7 YALE J. ON REG. 65, 86 (1990). In 1992, Congress found that the deregulated cable industry had become the "dominant nationwide video medium," serving "over 60 percent of the households with televisions." 1992 Cable Act, § 2(a)(3). The legislative record also showed that the industry was "highly concentrated." *Id.* § 2(a)(4). In addition, Congress found that "most cable television subscrib-

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Corporation; Prime Cable Corp.; TeleCable Corporation; Time Warner Entertainment Company, L.P.; United Video Cablevision, Inc.; Western Communications; and Wometco Cable Corp.

ers have no opportunity to select between competing cable systems," and that "[t]he result is undue market power for the cable operator as compared to that of consumers." *Id.* § 2(a)(2). Congress also found that the average monthly cable rate had increased "almost 3 times as much as the Consumer Price Index since rate deregulation" (*id.* § 2(a)(1); *see also* Senate Report at 4–8), and a Senate committee stated that consumers in some locations were being "gouged by cable operators" (Senate Report at 7). Congress concluded that rate reregulation was necessary to ensure that cable operators would not exercise "undue market power vis-a-vis video programmers and consumers." 1992 Cable Act, § 2(b)(5); *see also* Senate Report at 8–9. To that end, in the 1992 Cable Act Congress:

— provided a statutory definition of "effective competition" in order to increase the number of cable operators that are subject to rate regulation (47 U.S.C § 543(*l*)(1));

— required that the Commission "shall, by regulation, ensure that the rates for the basic service tier are reasonable" in light of statutorily prescribed standards (47 U.S.C. § 543(b)(1), (2));

— established a system for basic service tier rates under which local franchising authorities regulate pursuant to Commission rules (47 U.S.C. § 543(a), (b)); and

— required the Commission to establish a system of exclusive regulation by the Commission, again according to statutorily-prescribed standards, of upper tier "cable programming services" (47 U.S.C. § 543(c)).

Although some of its provisions apply more broadly, the core ratemaking provisions of the 1992 Cable Act are limited in application to cable systems that are not among the three types of systems defined as subject to "effective competition." 47 U.S.C. § 543(a)(2). The three types of systems exempted from rate regulation are: (1) "low penetration systems"—those with subscribership of less than 30 percent of the households in a franchise area (47 U.S.C. § 543(*l*)(1)(A)); (2) "overbuilds"—those subject to actual head-to-head competition with another cable system (47 U.S.C. § 543(*l*)(1)(B)); and (3) "municipal systems"—those operated by municipalities or by private operators that compete with systems operated by municipalities (47 U.S.C. § 543(*l*)(1)(C)). The vast majority of cable systems across the country do not fall into any of those three categories and hence are subject to rate regulation. The 1992 Cable Act directs the Commission to develop substantive ratemaking standards and procedures to enforce those standards, and requires the Commission, in implementing those directives, to consider an array of factors separately listed in the Act with respect to the "basic service tier" and "cable programming services." *See* 47 U.S.C. § 543(b), (c).

The Act divides categories of cable service into three parts: (1) basic service tier;[4] (2) cable programming service;[5] and (3) video programming offered on a per-channel or per-program basis.[6] The Act directs the Commission to

[4] Section 543(b)(7)(A) provides that the minimum requirements of basic service tier are: the carriage of local commercial television signals; the carriage of noncommercial educational television; public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers; and television broadcast station signals provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

Since the statute only specified minimum requirements, cable operators may add additional video programming signals or services to the basic service tier. *See* 47 U.S.C. § 543(b)(7)(B); *see also* opinion of Rogers, J., at 26–27 (requiring that each cable operator only offer a single basic tier).

[5] Cable programming service is defined as "any video programming provided over a cable system ... other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis." 47 U.S.C. § 543(*l*)(2).

[6] Video programming offered on a per-channel or per-program basis, which includes pay-per-view channels and premium channels

establish regulations to "ensure that the rates for the basic service tier are reasonable," and that the rates for other "cable programming services" are not "unreasonable." 47 U.S.C. §§ 543(b)(1), 543(c)(1).

As to basic service tier, local franchising authorities generally oversee the rates pursuant to standards the Commission sets. *See* 47 U.S.C. §§ 543(a)(2)(A), 543(a)(6). With respect to cable programming services, the Commission alone determines whether those rates are unreasonable. *See* 47 U.S.C. § 543(a)(2)(B). In establishing regulations governing basic service tier rates, the Commission must seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and itself. *See* 47 U.S.C. § 543(b)(2)(A). The Commission implemented three methods of regulating cable rates on a "tier-neutral" basis, that is, for both the basic service and cable programming service tiers.[7] Rate Order ¶ 396. First, it adopted a benchmark/competitive differential scheme. Then when the initial rates were lowered to a reasonable level, the Commission instituted a price cap. As an alternative to both the benchmark/competitive differential and the price cap, the Commission offered a cost-of-service option.

A benchmark rate is a price against which a given cable system's rate is compared. In adopting a benchmark/competitive differential scheme, the Commission compared data from cable systems that were and were not subject to regulation. The Commission determined that in the aggregate, the price per channel of noncompetitive systems exceeded that of competitive systems by 10 percent. *See* Rate Order ¶ 213. In the Rate Order, the Commission required noncompetitive cable systems to set their rates to conform with the benchmark formula. *Id.* ¶ 214. The Commission arrived at the benchmark formula by determining what rates a similarly

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such as HBO and Showtime, is not subject to rate regulation. *See* 47 U.S.C. §§ 543(a)(2), 543(c)(2)(D) & 543(*l*)(2).

[7] We briefly introduce the statutory and regulatory scheme of § 3 of the 1992 Cable Act, but the opinion of Ginsburg, J., discusses the scheme in detail.

situated system operating in a competitive marketplace would charge. *Id.* ¶ 213. If the benchmark formula required a reduction greater than the aggregate competitive differential of 10 percent, the system would only have to lower its rates by 10 percent, rather than reducing them to the benchmark. *Id.* ¶ 217 & n.544. Also, if the system was at or below the benchmark rate at the time it became subject to regulation, it would not be required to reduce its rates. *Id.* ¶ 216.

The Commission largely reaffirmed the Rate Order in the First Reconsideration. In the Second Reconsideration, however, the Commission reanalyzed the data used in the Rate Order and revised the competitive differential to 17 percent. That is, the Commission determined that noncompetitive systems charged 17 percent higher rates, on the average, than their competitive counterparts. The Commission reached this figure by emphasizing more heavily data from the "overbuilds" than data from the low penetrations and municipals, the other competitive systems. *See* Second Reconsideration ¶¶ 90–105. In addition, the Commission determined that all noncompetitive cable systems had to reduce their rates in effect on September 30, 1992, by the revised 17 percent competitive differential, regardless whether they were above the benchmark formula. *Id.* ¶ 109. If a 17 percent reduction placed the cable system's rates below its benchmark rate, the system could seek temporary relief by reducing its rates to the benchmark level until the Commission conducted an industry cost study to determine the appropriateness of the 17 percent reduction. *Id.* ¶ 111 & n.145.

Once it established the initial reasonable rates, the Commission decided to employ price cap regulation, expressed as a price per channel limit, on a going forward basis. *See* Rate Order ¶¶ 223, 227–29; Second Reconsideration ¶ 169. The price cap formula governed rate changes by capping the rates cable systems could charge, rather than their rates of return. The price cap regime's initial rates were based on the rates produced by either the benchmark/competitive differential or cost-of-service showing. The rate could then move up or down according to a formula that factored annual percentage change in the cost of goods and services in the economy as a whole, as measured by the Gross National Product Price Index and certain other external costs beyond the cable operator's control. Rate Order ¶¶ 239–54. The price caps did not penalize cable operators for adding programming. The price cap scheme allowed adjustments for inflation and full recovery for programming expenses, along with overhead and profit if a company chose to add channels. Second Reconsideration ¶¶ 245, 248. Under a price cap, companies have an incentive to reduce costs and operate efficiently. By reducing its costs, a company could capture the savings in higher profits.

To alleviate any unduly harsh effect from the required rate reduction, the Commission offered a cost-of-service option as an alternative to the benchmark/competitive differential and the price cap schemes. *See* Second Reconsideration ¶ 162; Rate Order ¶ 270. Those cable systems whose costs were so high that they were unable to lower their rates in accordance with the Commission's benchmark/competitive differential or price cap schemes could choose to set their rates based on their costs and revenues to insure that they realized a reasonable profit. *See* Second Reconsideration ¶ 162 & n.212. But the Commission noted that cost-of-service regulation could not be the primary means of rate regulation because "applying cost-of-service regulation to thousands of cable systems would impose tremendous administrative burdens on regulatory authorities and cable operators." Rate Order ¶ 392.

II

The First Amendment forbids some but not all economic regulations affecting speech. Some laws survive so long as they have a rational basis. Other laws will fall unless they rest on some extraordinary justification. Still other laws need to satisfy a standard somewhere between these two extremes. As to the Commission's cable rate regulations, we know from *Turner Broadcasting v. FCC*, 114 S. Ct. 2445 (1994), that rational basis cannot be the test. *Turner Broadcasting* holds that cable operators are entitled to the protection of the First Amendment's command that Congress shall not abridge the freedom of speech, or of the press (*id.* at 2456); and that laws of less than general application aimed at the press or elements of it are "always subject to at least some degree of heightened First Amendment scrutiny." *Id.* at 2458; *see Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 581 (1983). The question is what "degree"? The cable petitioners say the scrutiny must be "strict," which means, among other things, that the government's interest must be "compelling" and that the law is presumptively invalid. *See, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.,* 502 U.S. 105, 115–16 (1991); *R.A.V. v. City of St. Paul,* 112 S. Ct. 2538, 2547–49 (1992). The Commission and the United States, joined by some of the intervenors, say that an "intermediate" standard is warranted, requiring only an "important or substantial governmental interest" and restrictions no greater than "essential" to further the interest. *See United States v. O'Brien,* 391 U.S. 367, 377 (1968).

The Supreme Court's decision in *Turner Broadcasting,* applying the less rigorous of the two "heightened" standards to the "must-carry" provision of the 1992 Cable Act, stands rather firmly against the cable petitioners on this point. One frequently-mentioned reason for imposing the more demanding First Amendment standard petitioners advocate is that the law is content-based, that it differentiates "favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broadcasting,* 114 S. Ct. at 2459. No serious claim can be made that the cable rate regulations are of this sort. All cable systems not facing effective competition are covered, and they are covered regardless of the content of the programs they transmit. 47 U.S.C. § 543(a)(2). Neither the 1992 Cable Act nor the Commission's rate regulations have a content-based purpose. Congress became concerned about rising cable rates after it deregulated rates in 1984 (*see* Cable Communications Policy Act of 1984, Pub. L. No. 98–549, § 623, 98 Stat. 2779, 2788–89). The 1992 Cable Act, 47 U.S.C. § 543, sought to promote competition and lower monopolistic cable rates. In compliance with the Act, the Commission focused its cable rate regulation on the method of transporting the speech rather than the speech itself, comparing the rates of competitive cable operators—that is, cable systems lacking bottleneck control over transport service—with those of noncompetitive ones—systems with bottleneck control over transport service.

But if regulating cable rates is not done according to the nature of the programming, it nevertheless may affect the content of programs transmitted, so the cable petitioners tell us. This impact on content, they say, triggers strict scrutiny under *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 791 (1988). *Riley* is doubtless petitioners' strongest precedent. The state law in that case regulated professional fundraisers in the interest of preventing fraud, capping the percentage of donations fundraisers could retain as their fees for soliciting contributions to charitable organizations. If their fees exceeded 35 percent of the amount collected, the fees were presumed unreasonable, a presumption the fundraisers could rebut by showing that the charge was necessary because they were disseminating information at the charity's behest or because otherwise the charity's ability to raise funds would be significantly impaired. *Id.* at 785–86. This violated the fundraisers' First Amendment rights. Soliciting charitable contributions is protected speech. *Id.* at 789. The burden the cap imposed was, the Court said, "hardly incidental to speech"—"the desired and intended effect of the statute [was] to encourage some forms of solicitation and discourage others." *Id.* at 789 n.5. Since the state law constituted "a direct restriction on the amount of money a charity can spend on fundraising activity" and hence "a direct restriction on protected First Amendment activity," *id.* at 788–89 (internal quotation marks omitted), the Court subjected the law to "exacting First Amendment scrutiny" and struck it down. *Id.* at 789.

The analogy of this case to *Riley* fails at several critical junctures. Neither the "desired" nor the "intended effect" of the cable rate regulations is to encourage some types of speech while discouraging others. The premise of the cable petitioners' argument from *Riley, see also Grosjean v. American Press Co.*, 297 U.S. 233, 244–45 (1936), is that the rate regulations will have a deleterious impact on the content of the programming transmitted. Yet the Commission's study revealed that the content of programming was not one of the three key system characteristics that largely explained the variance in rates charged by cable systems nationwide. *See* Rate Order ¶ 210. Pressure exerted on cable operators to drop expensive programming or to add only inexpensive programming in response to a lowering of their rates is relieved by the Commission's "going forward" rules. A cable operator who adds a channel may "fully recover ... the actual level of programming expense incurred," along with an overhead charge and "a 7.5 percent markup." Second Reconsideration ¶¶ 246, 248. An operator who drops a channel must make a corresponding adjustment. *Id.* ¶ 246. Cable operators thus have no reason to prefer low-quality versus high-quality channels, which is why at least some cable programmers favored the Commission's approach. *Id.* ¶ 240.[8] Whatever impact rate regulation might have on the content of cable programming is, moreover, considerably less significant than the effect on content of the must-carry rules considered in *Turner Broadcasting.* The must-carry rules required cable operators to devote about one-third of their channels to broadcasters and to transmit the programming the broadcasters selected, yet *Turner Broadcasting* held that intermediate, rather than strict, scrutiny applied. The cable rate regula-

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[8] The Commission created further incentives for cable operators to add new channels in *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* Sixth Order on Reconsideration, Fifth Report and Order and Seventh Notice of Proposed Rulemaking, 76 Rad. Reg. 2d (P & F) 859 (1994) ("Sixth Reconsideration"). The Commission allowed operators to increase rates by a fixed amount per month per channel as an alternative to a percentage mark-up, thereby creating an incentive for the operators to add inexpensive or cost-free channels. Sixth Reconsideration ¶¶ 54–98. Also the Commission allowed operators to add "new product tiers" beyond the currently existing basic and non-basic tiers for which the operators can charge any rate as long as existing service is not fundamentally changed and subscribers affirmatively request a new tier. *Id.* ¶¶ 16–37.

tions, on the other hand, merely require cable operators to charge reasonable rates. As to the regulations' potential for causing incidental effects on content, the Commission adequately insulated cable operators through the cost-of-service option and, as we have mentioned, through incentives to expand cable programming. *Cf. National Cable Television Ass'n v. FCC,* 33 F.3d 66, 70–71 (D.C. Cir. 1994).

We accept, *arguendo,* the cable petitioners' contention that the government could not, consistently with the First Amendment, cap the price of a newspaper at 25 cents in order to limit monopoly profits and make the paper more affordable. But it does not follow that cable rate regulations must also be strictly judged. Cable systems are not functionally equivalent to newspapers. As we learned from *Turner Broadcasting,* the First Amendment's prohibition against a law requiring a newspaper to carry "that which it would not otherwise print" (*Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 256 (1974)), does not mean that a law requiring a cable system to carry broadcast programs is also unconstitutional, or that such a law is to be tested as if it governed newspapers. Strict scrutiny of laws directed only at one element of the media is unwarranted if the difference in treatment is " 'justified by some special characteristic' " of the medium. *Turner Broadcasting,* 114 S. Ct. at 2468 (quoting *Minneapolis Star,* 460 U.S. at 585). That cable rate regulation is so justified is plain. Congress found that "[f]or a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems." Pub. L. No. 102–385, § 2(a)(2), 106 Stat. 1460, 1460 (1992). The monopolies most cable operators now enjoy resulted from exclusive franchises granted by local authorities. *See* Thomas W. Hazlett, *Duopolistic Competition in Cable Television: Implications for Public Policy,* 7 YALE J. ON REG. 65, 65 (1990); *but see* Albert K. Smiley, *Regulations and Competition in Cable Television,* 7 YALE J. ON REG. 121 (1990). Exclusive franchising ended in 1992 (*see* 47 U.S.C. § 541(a)(1)), but the effects linger on.

While newspapers in some localities also may lack effective competition, this is not due to actions of the government. Furthermore, there is "an important technological difference between newspapers and cable television." *Turner Broadcasting,* 114 S. Ct. at 2466. A newspaper, no matter how secure its monopoly, is incapable of blocking its readers' access to competing publications. A cable operator, by contrast, has "bottleneck, or gatekeeper control over most (if not all) of the television programming that is channeled into the subscriber's home" because the operator owns and controls the transmission facility. *Id.* Cable service thus involves more than programming; it includes as well a transportation element. *Id.* at 2452. When a cable operator has a monopoly in a franchise area, that operator has exclusive control over the transportation element. This is why the Commission set its benchmark by examining the rates cable operators charged in competitive markets, that is, those markets where this exclusive control over the transportation element did not exist. Neither the benchmark/competitive differential nor the price cap depended on the content of speech and the administration of the benchmark/competitive differential and the price cap requires no reference to the content of speech.[9]

Like the must-carry rules in *Turner Broadcasting,* the cable rate regulations thus "are not structured in a manner

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[9] There is nothing to the cable petitioners' argument for strict scrutiny on the basis that the rate regulations render cable operators dependent on official discretion, forcing them to curry the regulators' favor by engaging in self-censorship. *See Forsyth County v. Nationalist Movement,* 112 S. Ct. 2395, 2402–03 & n.10 (1992); *Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 770 (1988). The Commission's rate regulations do not leave room for preferential treatment of a particular cable operator. While the 1992 Cable Act authorized the Commission to determine the initial level of rate reduction, once this was done the 17 percent reduction was to apply even-handedly, without regard to programming content. If the 17 percent reduction turns out to be too onerous for a cable system, that system can choose the cost-of-service alternative, a choice that is open to all noncompetitive systems and that operates according to well-established principles.